

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NEW ENGLAND

)	
IN THE MATTER OF)	
)	DOCKET NO. 11-008
Germain R. Bourdeau)	
Pleasant Acre Farms, LLC)	FINDINGS OF VIOLATION
Swanton, Vermont)	
)	and
Proceeding under Section 309(a))	
of the Clean Water Act 33 U.S.C.)	
33 U.S.C. ' 1319(a))	ORDER FOR COMPLIANCE

The following Findings are made and Order issued pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(a) of the Clean Water Act (the "Act"), 33 U.S.C. § 1319(a). This authority has been delegated to EPA's Regional Administrator, and further delegated to the Director of the Office of Environmental Stewardship, EPA, Region 1. This Findings of Violation and Order for Compliance ("Order") supercedes the Findings of Violation and Order for Compliance issued by EPA to Germain R. Bourdeau and Pleasant Acre Farms, LLC, in November 2010.

I. FINDINGS OF FACT AND VIOLATION

1. Germain Bourdeau is an individual and owner of Pleasant Acre Farms, LLC which has a principle address located at 194

County Road, in Swanton, Vermont. Mr. Bourdeau is a "person" under Section 502(5) of the Act, 33 U.S.C. § 1362(5).

2. Pleasant Acre Farms, LLC consists of a number of different farms and tracts of land. The wetlands that are the subject of this Order are located within Farm number 2439, Tract 153 and are located off of County Road, Swanton, VT. The portion of the wetlands within Tract 153 that were affected by the activities described below are located in Field UN2 (the "Site") (see Attachment 1A). Pleasant Acre Farms, LLC is a "person" under Section 502(5) of the Act, 33 U.S.C. § 1362(5).

3. Prior to the alterations described below, the wetlands in Field UN2 were forested and were part of a large undisturbed forested wetland complex (the "Wetlands") that extends throughout much of Tract 153 and beyond.

4. Sometime between Spring and Fall of 2006, Mr. Bourdeau and/or Pleasant Acre Farms, LLC, or persons operating under their control, supervision, or authorization, undertook mechanized land clearing, grubbing, grading, and ditching/sidecasting activities to clear the woody hydrophytic vegetation and drain the wetlands at the Site, thereby discharging soil and rocks (the "Dredged and Fill Materials") into approximately 3.0 acres of wetlands (the "Affected Wetlands"). The purpose of the work was to create more farmland for crop production.

5. The Wetlands, including the Affected Wetlands were, before the activities described above, and remain, "wetlands" as defined at 40 C.F.R. §§ 232.2 and 122.2.

6. The Wetlands are adjacent to an unnamed stream, which flows north into the Missisquoi River, which in turn flows to Lake Champlain. The Wetlands, the unnamed stream, the Missisquoi River and Lake Champlain are all "waters of the United States" under the definitions set forth in 40 C.F.R. §§ 122.2 and 232.2, and therefore are "navigable waters" under Section 502(7) of the Act, 33 U.S.C. § 1362(7).

7. The Dredged and Fill Materials discharged into the Affected Wetlands, as described in paragraph 4 above, are "pollutants" under Section 502(6) of the Act, 33 U.S.C. § 1362(6).

8. Mr. Bourdeau and/or Pleasant Acre Farms, LLC, and/or persons working under their control, supervision, or authorization, used farm equipment such as excavators, bulldozers, and dump trucks (collectively "heavy equipment") to perform the activities that resulted in the discharge of Dredged and Fill Materials into the Affected Wetlands.

9. The heavy equipment used to discharge the Dredged and Fill Materials into the Affected Wetlands constitute "point sources" under Section 502(14) of the Act, 33 U.S.C. § 1362(14).

10. The placement of the Dredged and Fill Materials into the Affected Wetlands by use of the heavy equipment constitutes the "discharge of pollutants" under Section 502(12) of the Act, 33 U.S.C. § 1362(12).

11. Section 301(a) of the Act, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge pollutants from a point source into waters of the United States, except in compliance with, among other things, the terms and conditions of a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. § 1344.

12. At the time that the discharges into the Affected Wetlands occurred, neither Mr. Bourdeau nor Pleasant Acre Farms, LLC had applied for or received a permit authorizing such discharge under Section 404 of the Act. Moreover, no other provision of the Act authorized the discharge of pollutants into the Affected Wetlands at the Site.

13. As set forth in findings 1-12 above, discharges of pollutants (Dredged and Fill Materials) from point sources (excavator, bulldozer, and other heavy equipment) to waters of the U.S. (the Affected Wetlands) occurred without a permit or other authorization under the Clean Water Act in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

14. Each day that the Dredged and Fill Materials remain in the Affected Wetlands without authorization from a permit issued under Section 404 of the Act, 33 U.S.C. § 1344, constitutes an additional day of violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

15. The activities described in paragraph 4 above, have destroyed the vegetation and altered the hydrology of the Affected Wetlands.

16. Prior to the activities described in paragraph 4 above, the Affected Wetlands likely provided wildlife habitat for birds, mammals, amphibians, reptiles, and invertebrates. In addition, the Affected Wetlands likely provided sediment and nutrient retention functions. Mr. Bourdeau's and/or Pleasant Acre Farms, LLC's activities at the Site eliminated or diminished those natural resource functions.

17. The natural resource functions described above that have been eliminated or diminished will not be restored without remedial action to successfully re-establish vegetated wetlands at the Site as described in the Order below.

II. ORDER

Based on the foregoing Findings of Fact and Violation, and pursuant to the authority of Sections 309(a)(3) and 309(a)(5)(A)

of the Act, 33 U.S.C. §§ 1319(a)(3) and (a)(5)(A), EPA hereby orders Mr. Bourdeau and Pleasant Acre Farms, LLC, to:

1. Make no further discharges of dredged and/or fill material into waters of the United States except as authorized by a valid permit issued by the U.S. Army Corps of Engineers ("Corps") pursuant to Section 404 of the Act, 33 U.S.C. § 1344 or except in conjunction with carrying out the remedial steps ordered below.

2. Restore 3.0 acres of the Affected Wetlands in Field UN2 (depicted on Attachment 1A to this Order). In the alternative, restore 2.1 acres of the Affected Wetlands in Field UN2, if Mr. Bourdeau and Pleasant Acre Farms, LLC submit an After-The-Fact ("ATF") permit application to the Corps and the Corps issues a permit allowing fill to remain in 0.9 acres of the Affected Wetlands (see paragraph II.6., below). If the Corps issues such permit, Mr. Bourdeau and Pleasant Acre Farms, LLC shall comply with all terms and conditions of such permit, including, but not limited to, any required compensatory mitigation. Successful wetland restoration requires the presence of 1) hydrology sufficient to support hydric soils and hydrophytic vegetation; 2) hydric soils; and 3) hydrophytic vegetation at an aerial density of at least 50% for trees and shrubs and 90% for ground cover after a 5 year period. The objective of the required

wetlands restoration is to restore and replace the lost ecological functions and values of the Affected Wetlands referenced in paragraph I.16 above. Any wetlands restoration shall be implemented consistent with the requirements of this Order and an EPA- and Corps-approved restoration plan, as described below.

3. Submit to EPA and the Corps, for review and approval, a wetland restoration plan (the "Plan") prepared by an NRCS wetlands scientist or other wetlands scientist experienced in wetlands restoration projects, and signed by Mr. Bourdeau and Pleasant Acre Farms, LLC. The Plan must address the restoration described in paragraph II.2., above, and must be submitted to the addresses in paragraph II.10., below, by April 8, 2011.

4. The Plan must be developed consistent with EPA's "General Guidelines for Wetland Restoration and Creation Projects" (Attachment 2) and must address the elements identified in paragraphs II.4.a through II.4.f below:

a. Identification, through the use of soil probes, of subsurface drainage (tiles) in the fields where restoration work will be performed, no later than May 1, 2011; and the disabling or removal of any drainage system, including tile drainage, that is found, prior to undertaking any restoration work, no later than May 15, 2011;

b. Creation of a pit and mound topography at the restoration site similar to the topography of the adjacent forested wetlands. An excavator or backhoe must be used in this effort to recreate the pre-existing pit and mound topography of the Site. This earth work must commence immediately upon completion of any drainage system disabling work, and must be completed no later than June 8, 2011;

c. Restoration of the ditched area that was excavated on the eastern side of the wetlands to be restored and any other ditches excavated for the wetland conversion, by filling in the areas using the side-casted material from the excavation to the extent possible. If necessary, soil that will support wetlands restoration shall be added to achieve the pre-disturbance grade. Backfilling activities must include soil compaction and be completed no later than June 8, 2011;

d. A wetland seeding plan, which requires seeding to be completed no later than June 15, 2011; and a wetland planting plan, which requires planting to commence no later than October 1, 2011 and be completed by October 15, 2011. Native trees and shrubs representative of the adjacent undisturbed wetlands must be planted within the restoration area and be of sufficient quantity to promote re-growth of the site to its pre-construction vegetative conditions. Woody plantings must be at

least 18 inches in height and have a minimum aerial coverage of 50% of the site. Prior to woody plantings, a wetland conservation seed mixture must be broadcast throughout the site at a rate of 35 lbs per acre. Coarse woody debris, taken only from already fallen tree limbs and fallen trees (no trees or limbs shall be cut down), shall be collected from adjacent areas and scattered over approximately 3-5% of the restoration site. Irrigation of the planted material is highly advised, especially during any extended dry periods for the 2011 growing season and for the first full growing season of 2012.

e. A plan to monitor the success of the restoration over a period of five (5) years commencing in the Spring of 2012. Monitoring must occur during the growing season to ensure that natural plant communities are re-establishing and that there is no further manipulation of soils, hydrology or vegetation necessary. The NRCS or other experienced wetland scientist must prepare an annual monitoring report documenting the findings and provide a copy to the Corps and EPA. For the 5 year period following planting, the number of living woody plants must be estimated by NRCS or the wetland scientist. If, after 2 years, the density of healthy planted and regenerated trees and shrubs is less than 50% aerial coverage, additional planting sufficient to re-establish the 50% aerial coverage

must occur the following spring (year 3). The cover of non-invasive herbaceous vegetation (grasses, ferns, herbs, etc.) must be evaluated each year until a stable herbaceous community is established. If after 2 years, ground cover is less than 90% aerial coverage, additional wetland seed sufficient to ensure 90% aerial coverage must be broadcast. Refer to section I.6 of the Corps of Engineers Compensatory Mitigation Guidance (Attachment 3).

f. Invasive species on the site must be controlled. See section I.4(f) of the Corps of Engineers Compensatory Mitigation Guidance on invasive species control for a list of common invasive species and common control measures (Attachment 4).

5. The Plan and any amendments thereto must be submitted to EPA and the Corps for review and approval at the addresses in paragraph II.10. EPA will provide written notice of the Agencies' approval of the Plan and any amendments thereto, approval with modifications required, or disapproval with modifications required. Any modifications to the Plan, or any amendments thereto, required by EPA must be addressed and the Plan resubmitted to EPA and the Corps for further review and approval, consistent with the schedule established in EPA's written notice of modification or disapproval.

6. In order to retain up to 0.9 acres of dredged and fill material in field UN2, Mr. Bourdeau and Pleasant Acre Farms, LLC must submit a complete ATF permit application to the Corps. The amount of fill for which an ATF permit is sought may be no greater than 0.9 acres, and the location of the fill to be retained must be consistent with the attached map (Attachment 1B). The complete ATF application must be submitted by April 8, 2011 to Marty Abair at the address listed in paragraph II.10 below. Mr. Bourdeau and Pleasant Acre Farms, LLC, shall comply with all terms and conditions included in any permit issued by the Corps, including, but not limited to, requirements for compensatory mitigation.

7. Any dredged or fill material in wetlands that is not permitted by the Corps must be removed and the areas restored. In the event that the Corps denies the ATF permit application, or does not authorize retention of the entire amount of the 0.9 acres of fill, Mr. Bourdeau and Pleasant Acre Farms, LLC shall submit to EPA and the Corps at the addresses in paragraph II.10. below, within 30 days of the date that the Corps denies, or denies in part, the ATF permit application, an amendment to the Plan to address removal of fill and restoration of that portion of the area for which the Corps denied the permit application.

The amendment to the Plan shall address each of the substantive requirements set forth in paragraph II.4. of this Order.

8. If a complete ATF application to retain the 0.9 acre fill is not submitted to the Corps by the April 8, 2011 deadline, Mr. Bourdeau and Pleasant Acre Farms, LLC shall submit to EPA and the Corps, by May 8, 2011, an amendment to the Plan to address the removal of fill and restoration of the 0.9 acre area. The amendment to the Plan shall address each of the substantive requirements set forth in paragraph II.4. of this Order.

9. Complete all actions related to the Plan in accordance with the approved Plan and any amendments thereto, and consistent with the schedule described in paragraph II.4 above (or any approved amendments), unless it can be demonstrated to EPA's satisfaction that weather constraints or other unpreventable occurrences prevented the work. If such demonstration is made, EPA will confirm in writing the revised final dates for completing remaining restoration actions, taking into account the delay justified by such constraints/occurrences.

10. Within fifteen (15) days of completing all restoration actions as required by the approved Plan and any amendments thereto, submit written notice and photographic evidence of the

status of compliance with this Order. The notice shall be sent to the Agencies as listed below:

Denise Leonard
U.S. Environmental Protection Agency
Mail Code OES05-1
5 Post Office Square
Boston, Massachusetts 02109-3912

Marty Abair
U.S. Army Corps of Engineers
8 Carmichael St. Suite 205
Essex Junction, Vermont 05452

11. Photographs must be taken at the restoration site on an annual basis from at least two locations depicting the restored wetlands during the same time of the growing season and from approximately the same photographic locations. A report with these photographs and a written discussion of the progress of the restoration shall be submitted by November 30th of each monitoring year to EPA and the Corps at the addresses listed above.

12. Non-compliance with any requirements of this Order must be reported to EPA within 2 weeks of the date of non-compliance. If non-compliance is reported, notification must include the following information:

- a. A description of the noncompliance;
- b. A description of any actions taken or proposed to

be taken to comply with the requirements;

c. A description of any factors which explain or mitigate the noncompliance; and,

d. An approximate date by which the required action will be taken.

Providing notice of non-compliance shall not in and of itself excuse any non-compliance.

13. This Order is not a permit, and Mr. Bourdeau's and Pleasant Acre Farms, LLC's liability under the Clean Water Act or any other federal, state or local law or regulation is not excused by compliance with the terms of this Order. Section 309(b) of the Act, 33 USC § 1319(b), and § 309(d) of the Act, 33 U.S.C. § 1319(d), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, et seq., the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, et seq., and the rule for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.1-19.4 (61 Fed. Reg. 69360, 69 (Dec. 31, 1996); 69 Fed. Reg 7121, 7 (Feb. 13, 2004)); 73 Fed. Reg 75,340, 5 (Dec. 11, 2008), authorize EPA to seek injunctive relief and civil penalties for a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), or of an Order issued pursuant to Section 309(a) of the Act, 33 U.S.C. § 1319(a), in amounts of up to \$32,500 per day of violation between March 16, 2004 and

January 12, 2009, and up to \$37,500 per day of violation after January 13, 2009. Section 309(g), 33 U.S.C. § 1319(g), as amended by the above referenced penalty adjustment statutes and regulations, authorizes EPA to seek administrative penalties of up to \$11,000 per day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), between March 16, 2004 and January 12, 2009, up to a maximum of \$157,500, and up to \$16,000 per day of violation, up to a maximum of \$177,500, for violations after January 13, 2009. Section 309(c)(1), 33 U.S.C. § 1319(c)(1), authorizes EPA to seek criminal fines and imprisonment for willful or negligent violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

14. This Order shall become effective upon receipt by Mr. Bourdeau and Pleasant Acre Farms, LLC.

Susan Studlien, Director
Office of Environmental Stewardship
U.S. Environmental Protection Agency
Mail Code OES04-5
5 Post Office Square
Boston, Massachusetts 02109-3912

Dated: _____

See Attachments

Attachment 1A and 1B: Aerial Photos, Swanton, VT

Attachment 2: EPA General Guidelines for Wetland Restoration and Creation Projects

Attachment 3: Section I.6 of the Corps of Engineers
Compensatory Mitigation Guidance

Attachment 4: Section I.4(f) of the Corps of Engineers
Compensatory Mitigation Guidance